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91-1796

Supreme Court, U.S.
FILED
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Office of the Clerk

Case No. _____

THE SUPREME COURT OF THE UNITED STATES

Term: October 1991

RICHARD R. COOK
pro se Petitioner

v.

DEPARTMENT OF THE NAVY
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Richard R. Cook, pro se Petitioner
3227 Olympus Dr. N.E.
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QUESTIONS

Pursuant to Supreme Court Rule 14.1.(a) and jurisidictionaly based on Rule 10.1.(a)

1. Whether the United States Court of Appeals for the Federal Circuit sanctioned judicial proceedings of the Merit System Protection Board which so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of United States Supreme Court's power of supervision in the following actions:

(a) Failure of the MSPB Administrative Judge to either acknowledge or rule upon appellant's motions to invoke **prima facie** procedures and rules of evidence.

(b) Failure of the MSPB Administrative Judge to allow the submission of an evidentiary petition presented by the appellant for which signatures were obtained under duress and for that reason presented as a sealed document before the Board.

(c) Failure of the MSPB Administrative Judge to allow **agreed to stipulations** signed by both parties pursuant to 5 CFR 1201.63.

(d) Failure of the MSPB Administrative Judge to act within accepted judicial

procedures in denying consideration and ruling on subsidiary questions fairly included within the case before him and for which the Board has statutory authority by law, rule, or regulation? (See 5 USC 2302 "Prohibited Personnel Practices" and 5 CFR 1201.3 (a)(19) "Appellate Jurisdiction", Employment practices administered by the Office of Personnel Management....)

Pursuant to Supreme Court Rule 14.1.(a) and jurisdictionaly based on Rule 10.1.(c)

2. Whether the appellant should be allowed to invoked a **prima facie** case in the course of adjudication hearings before the Merit System Protection Board when convened for the purpose of ruling on alleged violations of the **Whistleblower Protection Act of 1989(Pub. L. 101-12)** as codified in various sections of the USC and CFR statutes (5 USC 2302(b), 5 CFR 1209, 5 CFR 1201, and 5 USC 7701) for which the Board has assumed jurisdiction pursuant to 5 USC 1214(a)(3) and 5 USC 1221(a)? See 5 CFR 1209.2(b)(1).

3. Whether the procedures, comments, and rulings of the Administrative Judge, when taken as a whole, constituted grievous harm to the proceedings and to his subsequent ruling on the facts?

4. Whether the ruling of the United States Court of Appeal for the Federal Circuit is wholly and judicially beyond any discretionary powers in failing to acknowledge the MSPB's total disregard for the appellant's rights under the Whistleblower Reprisal statutes: Specifically the imposition of **preponderance of evidence** requirement contrary to statutes (See 5 CFR 1209.11 "Burden and degree of Proof"; 5 USC 7701(c)(1)&(2) "Appellate Procedures, and 5 CFR 1201.56(b) "Affirmative defenses of the appellant") and the failure of the MSPB to require and enforce the **clear and convincing** standard of evidence of the Agency as directed by the same statutes. And whether that failure was negligent, purposeful, and intentional in light of the fact that the appellant had presented sufficient statement of the facts to unequivocally establish said error and cited 5 CFR 1201.115(c) in his Informal Brief before that court?

5. Whether the actions of the various agencies (Office of Personnel and Management, Inspector General of the Navy, The Office of Special Counsel), the MSPB Administrative Judge, the Full MSPB Board

and the United Sates Court of Appeals for the Federal Circuit in the Subject action constitutes an obstruction of the appellants civil liberties and rights of recourse in keeping with the spirit anad the letter of the Revised Civil Service Reform Act?

(a) Whether said actions constitute the introduction of a **"Chilling Effect"** relative to the appellant's current action being brought before this court?

(b) Whether the subject actions on the part of the above named parties can reasonably be construed to constitute a cohesive and united effort to dissuade victims of Whistleblower Reprisals from seeking corrective action.(Commonly perceived as "Rubber Stamp Bureaucracy)

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Pursuant to Rule 14.1.(b)

Judgements of the following parties are sought to be reviewed.

1. The U.S. Court of Appeals for the Federal Circuit, WA, D.C.
2. U.S.A. Merit System Protection Board WA, D.C.
3. U.S.A. Merit System Protection Board Seattle Regional Office.

4. U.S. Office of Personnel Management, Seattle, WA

5. U.S. Dept. of the Navy, Inspector General's Office, WA, D.C.

6. U.S. Office of Special Counsel, WA, D.C.

Pursuant to Rule 14.1.(d)

Reports and opinions delivered by other Courts or Agencies.

1. **MANDATE:** U.S. Court of Appeals for the Federal Circuit, Case SE122191W0094, dated 3 March 1992

2. **JUDGMENT:** U.S. Court of Appeals for the Federal Circuit, Case SE122191W0094, dated 7 Feb. 1992

3. **ORDER**(on Appeal): U.S.A. Merit System Protection Board, WA, D.C., Docket No. SE122191W0094, dated 20 July 1991

4. **INITIAL DECISION:** U.S.A. Merit System Protection Board, Seattle Regional Office, Docket No. 122191W0094, Dated 25 March 1991

5. **OPINION AND ORDER:** U.S.A. Merit System Protection Board, WA, D.C., Docket No. SE344390W0268, dated 1 Nov. 1990

6. **CLOSURE LETTER:** U.S. Office of Special Counsel, WA, D.C., OSC file No. MA-90-0736, dated 28 Sept. 1990

7. **INITIAL DECISION:** U.S.A. Merit

Protection Board, Seattle Regional Office, Docket No. SE344390W0268 (Changed from SE1222190W0268), dated 2 July 1990

8. **FINAL DISPOSITION:** U,.S. Office of Personnel Management, Seattle Area Office, dated 14 July 1989.

9. **FINAL DISPOSITION:** U.S. Department of the Navy, Inspector General's Office, Dated 15 Dec 1989

Pursuant to Rule 14.1.(e)

The grounds for Supreme Court jurisdiction in this case lie with the appeal rights of the appellant in a case ruled upon and for which a manadate has been issued by the United States Court of Appeals for the Federal District dated 7 February 92 and 3 March 92 respectively.

Pursuant to Rule 14.1.(f)

The following statutes are cited by the Appellant:

5 CFR 1209: PRACTICES AND PROCEDURES FOR APPEALS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING AND REQUEST FOR STAYS OF PERSONNEL ACTIONS IN SUCH CASES

5 USC 7701 APPELLATE PROCEDURES

5 CFR 2302 PROHIBITED PERSONNEL PRACTICES

5 CFR 1201 PRACTICES AND PROCEDURES (MERIT SYSTEM PROTECTION BOARD

Pursuant to 14.1.(g) STATEMENT OF CASE

The original judicial action in this case was preceded by a series of Administrative Actions and a Judicial Rulings of the MSPB denying jurisdiction. Separate actions of the various administrative agencies which took place prior to the onset of the initial judicial action are provided in attached appendix pursuant to Rule 14.1.(F&K) of this court. MSPB Administrative Judge John W. Tapp, of the Seattle regional office, in his first "Initial Decision" dated 2 July 90 ruled that the appellant's action brought under the Whistleblower Protection Act of 1989 as codified at 5 CFR 1209.5 (c&d) failed to meet jurisdictional requirements.
Appellant petitioned the full MSPB in writing on 6 August 90 and the Board subsequently dismissed his petition as untimely. Appellant had provided a statement from the U.S. Post Office to corroborate his contention that his submission had been timely filed but the Board rejected it.

A second "Acknowledgment Order" was issued on 3 December 90 followed by an "Order and Notice of Hearing and Prehearing Conferences". Prehearing conferences were then held on four separate occasions. The first verbal petition to invoke "prima facie" rules was presented by Samuel Fleshman, counsel for the appellant, at the outset of the first of these conferences. The appellant reintroduced the "prima facie" concept throughout the prehearing conferences, at the outset of the hearing in his opening arguments, in his closing arguments, and in each subsequent appeal action. At no time during the course of these events was the appellant provided a opinion or ruling on the issue.

Judge Tapp, in ruling on allowable witnesses during the prehearing conferences responded to the appellant's objection to limits placed on the number of witnesses the appellant was to be allowed by suggesting the submission of a petition in evidence to substantiate appellant's contentions before the Board. Appellant's petitions obtained for evidential use were subsequently disallowed when he advised the Judge that the petitions had been compiled under duress and therefore would be

submitted as sealed documents before the Board. Appellant submitted a written objection to this ruling at the outset of the hearing.

The appellant also submitted a copy of the "Agreed to Stipulations" signed by both parties at the outset of the hearing. Judge Tapp ruled that both the "Agreed to Stipulations" and "proposed settlement agreements" presented by the appellant as Exhibits 8 and 12 respectively be stricken from the Appellant's Exhibit list. Appellant contends that these were prominent and vital exhibits to his case and should have been central in arriving at a ruling on the facts. In rendering his decision, Judge Tapp declined consideration and ruling on subsidiary questions fairly included within the case before him and for which the Board has statutory authority by law, rule, or regulation. The areas of promotion; detail, transfer, or reassignment; and performance evaluation were not approached. These areas fall directly under the administration of the Office of Personnel and Management heading "Employment Practices" and for which the OPM is under the direct jurisdiction of the MSPB by statute. All three of these issues were central to the case and comprised the large portion of the proceedings and

therefor should have been ruled upon within the initial decision.

In reference to the appellant's question 3 before this court, the appellant notes the following: Judge Tapp instructed a witness upon dismissing him from the stand that "he was done for now and forever as far as he was concerned" relative to the witnesses further availablity in the case; evidence central to the case was disallowed as noted earlier; and the failure of Judge Tapp to give due consideration to events prior to the WPA of 1989 in establish a sequence of reprisal actions as he had indicated would be the case during prehearing conferences.

The fifth and final question presented by the appellant is based on an overview of the combined actions of the various agencies and courts which appellant contends present an unreasonable obstruction to the appellant's cause. The extent and nature of these actions is evidenced in the appellant's appendix prepared pursuant to Rule 14.1.(k) of this Court.

Appellant is prepared to provide statutory arguments upon docketing of this case before the Court.

Pursuant to Rule 14.1.(i)

The basis for federal jurisdiction in the court of first instance, the United States Merit System Protection Board, fell under rights provided in 5 CFR 1209.5(c) as an "Individual Right of Action" appeal before the Board.

Pursuant to Rule 14.1.(j)

Petition is presented for allowance of this writ based upon jurisdictional considerations contained in Rule 10 of the Rules of the Supreme Court. As noted in the presentation of Questions, the appellant contends that the United States Court of Appeals for the Federal Circuit in affirming the lower court (MSPB) ruling has fallen under the jurisdictional powers of the United States Supreme Court as stated at Rule 10.1.(a) and 10.1.(c) and the principles stated therein.

Appellant's interpretation and application of Rule 10.1.(a) is presented under appellant Questions 1.(a)-(d).

Appellant applies a <u>failure to decide</u> an important question of federal law **vice** <u>has decided</u> an important question in his

interpretation of Rule 10.1.(c). At issue in general if the question whether the Supreme Court has jurisdiction over a general failure of the judicial system as a whole to recognize and enforce important and vital USC and CFR statutes (i.e. WBA of 1989) in accordance with the letter and the intent of those federal laws. The questions raised by the appellant relative to the proposed application of a **prima facie** case and the necessity of providing rulings and opinions on Rules of Evidence when challenged should stand on their own merit as important aspects of federal law before this Supreme Court.

Respectfully Submitted,

Richard R. Cook

Richard R. Cook
pro se Appellant
17 April 1992

APPENDIX....Rule 14.1(k)

Judgment

Statute Text

United States Court of Appeals
for the Federal Circuit

91-3527

RICHARD R. COOK, Petitioner,

v.

DEPARTMENT OF THE NAVY, Respondent.

Judgment

ON APPEAL from the MERIT SYSTEM PROTECTION BOARD

in CASE NO(S). SE122191W0094

This case having been considered, it is

ORDERED AND ADJUDGED:

Per Curiam (NIES, Chief judge, MAYER AND PLAGER, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

DATED FEB-7 1992 **ENTERED BY ORDER OF THE COURT**

Francis X. Gindhart, Clerk

FILLED AS A MANDATE: March 3, 1992

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SEATTLE REGIONAL OFFICE

RICHARD R. COOK, Appellant v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER SE122191W0094 DATE: March 25, 1991

Richard R. Cook, Bremerton, Washington, pro se.

Diane D. Ugrin, Bremerton, Washington, for the agency.

BEFORE

John W. Tapp
Administrative Judge

INITIAL DECISION

INTRODUCTION

On November 26, 1990, Richard R. Cook filed an individual right of action appeal requesting corrective action under the provisions of the Whistleblower Protection Act of 1989 (the WPA).[1] Appellant, a WG-10 Machinist in Shop 31 (the Inside Machine Shop) at the Puget Sound Naval Shipyard (PSNS), alleged that management officials retaliated

against him in various ways after he engaged in whistleblowing from late 1987 through 1989. The specific actions at issue in this appeal are 1) an alleged pattern of "loaning out" appellant to less desirable sections of the shop, which resulted in reduction of his performance evaluations and his chances for advancement, and 2) failure to select appellant for promotion to Machinist Foreman from a January 1990 list of "best qualified" eligibles.[2]

The Board assumed jurisdiction pursuant to 5 U.S.C. §§ 1214(a)(3) and 1221(a). *See* 5 C.F.R. § 1209.2(b)0(1).[3] A hearing was held, at appellant's request, on February 28 and March 1, 1991.

For the reasons explained below, appellant's request for corrective action is DENIED.

ANALYSIS

General law

In an individual right of action appeal (IRA), an employee must prove by preponderant evidence that a disclosure described in 5 U.S.C. § 2302(b)(8), commonly referred to as "whistleblowing," was "a contributing factor" in a "personnel action" which was taken, or not taken, against him. If the employee does this, the Board will order corrective action unless the agency demonstrates by "clear and

convincing evidence" that it would have taken the same action absent the disclosure. *See McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 416, 420 (1990).

Relevant facts

Appellant entered the machinist apprentice program at PSNS in 1977. He achieved journeyman status in October 1981 and in 1987 was assigned to Section 36 (the valve section) of Shop 31 (the Inside Machine Shop).

In the Fall of 1987, he volunteered for "loan-out" to Shop 38 (the Outside or Marine Machine Shop). Such loan-outs were relatively common in the Mechanical Group at PSNS, primarily to address workload imbalances or provide special expertise.[4]

While appellant was voluntarily on loan to Shop 38, the event occurred which he believes initiated a chain of retaliatory events against him. This was "the gauge incident" in November 1987.

The record is sketchy as to the exact nature of the gauge incident. Apparently, too many gauges and other instruments were "expiring" (going out of calibration), because they had not been replaced on schedule, and Section 36 (the valve section) bore the brunt of criticism because employees in that area used gauges most frequently and had responsibility for their care. *See* testimony

of Al Amdahl, then GF for Section 36, and Neal Baker, then GF for Section 37 (the pump section). *See also* testimony of William Kalina, WG-8 Machinist. Appellant understood that 41 employees were found to be using out-of-date instruments and were to receive written reprimands but only 4, including himself, actually did. Thus, he wrote a letter to the then-shipyard commander, Captain Samford, protesting this treatment. As a result, the letters were withdrawn and then-Group Superintendent Owen Kelly apologized to the four singled out employees.

Shortly thereafter -- or, as appellant portrayed it, "at the agency's first opportunity to retaliate after the gauge incident" -- appellant, and four other employees, were loaned out to Shop 11 (the Shipfitters Shop). Appellant did not volunteer for this loan-out. Mr. Amdahl testified that he was appellant's second-level supervisor when appellant was loaned to Shop 11 and that he was loaned because the shipfitters were having quality assurance problems with hatchwork that only a machinist could handle. This loan-out lasted from early March through August 1988. *See, e.g.*, stipulation #3 (Board file tab 18), and appellant's exhibit #9, sixth page down (Board file tab 22).

When appellant returned form loan to Shop 11, he learned he was going to be rated "highly satisfactory" for the period from April to October 1988 by his nominal immediate supervisor, J. Prante, and his then-second level supervisor, Neal Baker. This disturbed appellant because he had previously been rated "outstanding" for a number of years and because he concluded that Mr. Baker had coerced Shop 11 into lowering its original outstanding evaluations.

Appellant did receive the lesser rating and he refused to sign the evaluation form. *See* appellant's exhibit 6, third page down. (Board file tab 22). On November 21, 1988, he also wrote a letter to the then-shipyard commander, Capt. Clark, protesting this evaluation, Baker's "manipulation," and the "political spoils system" in Shop 31 and shipyard management generally. (Agency tab 4E, eleventh page down).

Shortly thereafter, in February 1989, appellant was loaned to Section 12 (the turret lathe section) supervised by Winfred Boyd. Appellant had worked for Mr. Boyd in prior years and had received "outstanding" performance evaluations from him. (Appellant's exhibit 6). Appellant, however, alleged that Section 12 was the "dumping ground" for employees who displeased

management. Also, Mr. Boyd told appellant when he arrived that, initially, he would only rate appellant "satisfactory" because it took time for new people to learn the equipment.

Mr. Boyd eventually rated appellant "fully satisfactory" for the period from October 1088 to April 1989. (Appellant's exhibit 6). In June 1989, appellant wrote to a U.S. Senator, a U.S. Representative, and the Naval Sea Systems Command (NAVSEA) Inspector General's (IG's) office with his complaints. Inquiries were made and responses were provided. (Agency tabs 4F through 4J).

On November 3, 1989, the shipyard issued a "Recruitment Announcement" for Machinist Foreman, WS-10, in Shop 31. (Agency tab 1A). Appellant applied and was one of 78 employees rated "best qualified" for selection. (Agency tab 1B). Seven candidates were selected in January 1990 on temporary appointments which were made effective in September 1990.[5] (Agency tab 4N, Board file tab 16). Appellant was not selected.

In February 1990, appellant was loaned out to Shop 06 (Toolmakers and Cutter Grinders). Mr. Boyd testified that appellant volunteered for this loan-out. Appellant was still in Shop 06 at the time of the hearing in this case.

On or about March 1990, appellant filed a

complaint with the Office of Special Counsel (OSC) claiming agency retaliation for whistle-blowing by, *inter alia*, the multiple loan-outs and numerous nonselections for promotion, including the nonselection at issue in this case.[6] By letter dated September 28, 1990, the OSC closed its file on appellant's case. (Board file tab 1, attached to appeal petition).

Thereafter, appellant timely filed the instant appeal. At appellant's request, he went first at the hearing and presented eight witnesses who were produced by the agency. Appellant did not testify on his own behalf, however. The agency presented one witness in its case.

Protected disclosures

It is actually unclear whether appellant's December 1987 letter to Captain Samford was a protected disclosure under the WPA. First, the letter itself was not introduced. Second, there was very little evidence introduced as to its contents. And, third, that evidence which was introduced suggested that appellant's letter was essentially a personal matter relating to the unfairness and "lack of professionalism" on the part of the then-Group Superintendent Owen Kelly in giving appellant a "disciplinary letter." *See* appellant's description of the

1987 letter, at page 3 of his November 1988 letter to Captain Clark (Agency tab 4E).

The term "whistleblowing" refers to "any disclosure" of information reasonably believed to evidence "a violation of law, rule, or regulation," or "gross mismanagement, a gross waste of funds, and abuse of authority, or a substantial and specific danger to public health and safety." *See* 5 U.S.C. § 2302(b)(8). *See also* 5 C.F.R. § 1209.4(b). Prior to the WPA, the Federal Circuit held that disclosures regarding alleged improprieties that were essentially personal in nature, and not motivated to inform the public about matters of general concern, were not protected "whistleblower" disclosures. *See Fiorillo v. United States Department of Justice, Bureau of Prisons*, 795 F.2d 1544, 1550-51 (Fed. Cir. 1986). In *Williams v. Department of Defense*, MSPB Docket No. NY075290S0119, slip op. at 7 n. 5 (Jan. 7, 1991), the Board noted, however, that Congress, by changing "a disclosure" to "any disclosure" in the WPA, intended to overrule *Fiorillo* and eliminate the issue of personal motivation in determining whether a disclosure was protected whistleblowing.

Regardless, appellant's later letters in 1988 to Captain Clark, the two Congressmen, and the Navy IG clearly alleged violations of

law, gross mismanagement and waste of funds, and abuse of authority which were, or could have been, matters of public concern. Therefore, I find that appellant engaged in protected activity under the WPA. See McDaid, 46 M.S.P.R. at 421-2.

The loan-outs

Assumedly, the Shipyard's practice of "loaning out" employees is a "personnel action" as defined by either 5 U.S.C. §§ 2302(a)(2)(A)(4) (a "detail, transfer, or reassignment") and/or 2302(a)(2)(A)(5) (a "decision concerning...training...if the... training may reasonable be expected to lead to an appointment, promotion, performance evaluation, or other personnel action"). *See also* 5 C.F.R. § 1209.4(a)(4) and (9).

Even assuming this to be true, however, there is no basis in the evidence to find that retaliation for whistleblowing was a contributing factor in the loan-outs. The only loan-out over which the Boar actually has jurisdiction is the February 26, 1990, loan-out to Shop 06. All the other loan-outs occurred prior to July 9, 1989, the effective date of the WPA. Therefore, the Board has no jurisdiction over them *per se*. *See, supra*, at 2 n. 2. They may only be considered for their evidentiary value, if any, regarding the February 26, 1990, loan-out to Shop 06.

There is no basis to conclude that the Shop 06 loan-out itself was retaliatory. It occurred while appellant was working on loan in Section 12 for Winfred Boyd. Mr. Boyd testified that Shop 06 was one of the best places too send people and that appellant volunteered to go. There was no evidence to the contrary and no reason to disbelieve Mr. Boyd.[7] To the contrary, I found him a credible witness. Moreover, Boyd had not been the target of any of appellant's whistleblowing disclosures, nor was he even aware of them until appellant himself told him about them. Appellant never claimed that Boyd harbored ill feelings or retaliated against him in any way.

Thus, if appellant is to prevail in regard to the loan-outs, he would assumedly have to establish that the prior loan-outs were retaliatory and, either alone or in conjunction with other prior retaliatory actions, were the real cause of his outwardly voluntary move to Shop 06.[8] In other words, appellant would have to show that he went to Shop 06 only to escape his untenable position in Section 12 where he was as the result of retaliation.

As to the other loan-outs, appellant's general argument was that supervisors do not normally loan their best performers, such as

himself; that he was loaned out much more than most other employees; that excessive loan-outs hurt one's career; and that he was loaned to the least desirable areas for acquiring new technical skills and enhancing one's chances for advancement. Thus, appellant concluded, retaliation for whistleblowing must have been a contributing factor in his being loaned-out.

More specifically, he noted that just after voluntarily going on loan to Shop 38, and the occurrence of the gauge incident, he was rated "outstanding" for 1987 by his immediate supervisor from 1985 through 1988, Phil Wilkins, yet he was involuntarily loaned out to Shop 11 with Mr. Amdahl's approval as second-level supervisor. Appellant argued that Amdahl was retaliating against him for his letter to Captain Samford in regard to the gauge incident. There are several problems with this argument, however.

First, Mr. Amdahl testified that appellant's letter was not particularly significant to him, and he had no ill feelings toward appellant as a result of it, because the gauge problem was already well known in the shipyard and he was already "being hammered" for it from all directions. I found Mr. Amdahl a credible witness as he testified, and his statement is consistent with the absence of any evidence that appellant's

letter either first revealed the gauge problem or criticized Amdahl.[9] It is also consistent with the undisputed facts that there was machinist work (hatch repair) which needed to be done in Shop 11 and that at least two other machinists, in addition to appellant, were loaned to Shop 11 at roughly the same time for the same purpose.[10] Finally, it is noteworthy that there was no evidence that Shop 11 was a "dumping ground" or a bad place to work and no evidence as to the identity of the immediate supervisor who, according to standard operating procedures, would have recommended appellant for loan-out.

The next event in appellant's scenario was the merely "highly satisfactory," as opposed to his usual "outstanding," rating he received from Mr. Prante and Neal Baker. Appellant ascribed improper motives to Mr. Baker as a result of this rating because, after Shop 11 supervisors had given appellant an outstanding rating for his time on loan-out to them, Baker called Shop 11 to inquire about the basis of this rating. Appellant interpreted this as an attempt by Baker to negatively influence Shop 11.

Mr. Baker testified that he called Shop 11 merely to get some specific factual justification for the rating because shipyard policy had always required narrative

explanation for "outstanding" ratings and because the shipyard command had recently directed upper-level managers to more carefully scrutinize high performance ratings since they seemed to be disproportionately high in relation to more objective ratings of the facility's performance generally. Thus, he called Shop 11 and was referred to James Williams, the day-shift Shipfitter Foreman, who could give him no explanation for the rating and referred him to "the backshift foreman," a man named Coleman. According to Baker, Coleman either could not or would not provide him with any basis for the rating either.

Mr. Williams testified consistently with Mr. Baker. He stated that his shop did rate appellant very highly, perhaps outstanding, but it was only a partial evaluation, they were not measuring appellant against any specific performance standards. Also, he had referred Baker to Coleman because he (Williams) had actually not observed appellant's work as much as Coleman had. Coleman did not testify.

Appellant maintained that he was the only loaned employee about whom the loaning shop requested information. Both Williams and Baker testified that it was standard operating procedure for employees rated "outstanding" as

far as they were aware. There was no evidence that any of the other employees were rated outstanding.

After receiving the "highly satisfactory" rating, appellant refused to sign it and wrote his November 21, 1988, letter of protest and accusation against Mr. Baker to Captain Clark. On February 12, 1989, Mr. Baker loaned appellant out to Winfred Boyd in Section 12. Appellant maintained this move was retaliatory because Section 12 was a "dumping ground" for employees who displeased management.

Mr. Baker testified that he loaned appellant out because Shop 12 had a serious need for assistance and his workload was low. Moreover, Baker testified that appellant obviously didn't want to work for him at that point and he felt an assignment to Shop 12 under Mr. Boyd would give appellant a "fresh start."

Mr. Boyd acknowledged in his testimony that he got a number of employees assigned to him who had disagreements with their previous supervisors. He testified that he never inquired about their past problems and told them they were starting with a clean slate. He also testified that he did not feel that his Shop was a "dumping ground." Although much of the work in this area was repetitive and less challenging, there was variation. In

addition, he had just received new, state-of-the-art machinery which appellant got to work on. Tom Hamilton corroborated this last point.

In a more general vein, several witnesses testified that, at different times, various areas, including appellant's home area, Section 36, were perceived by employees as less desirable. These perceptions were, however, highly subjective and tended to change regularly over time. *See* testimony of Al Amdahl, and Tom Davies, GF II in Shop 31.

As to the broader question of the effect of loan-outs on an employee's career, the evidence from those witnesses who testified was unanimous that, while it could have some minor or temporary negative effects, it was generally positive and in fact most often enhanced an employee's chances for promotion. Mr. Amdahl testified that it provided an opportunity to broaden one's skills and demonstrate versatility; in his view, it had "considerably helped" a number of employees in the past. Tom Davies testified that it helped with promotion because it allowed an overview of the function and structure of the shipyard generally. The effect of being loaned out depended on what an employee made of each assignment. He believed that being loaned out helped him get promoted. Finally, Ron

Barrington, Mechanical Group Superintendent, testified that it could be viewed negatively, to the extent that it is a deviation from a specialty career path, but the broadening aspect enhanced an employee's chances for promotion generally. He testified that, as a Mechanic, he was loaned out to areas he viewed as irrelevant at the time, yet, in retrospect, those loan-outs "definitely" enhanced his career.

Appellant also claimed that the loan-outs he was subjected to were the result of retaliation and were destructive to his career because he was loaned so frequently after 1987 and for such long periods of time in comparison to other employees. He presented an analysis of loan-outs based on a limited number of employees, i.e., those presently assigned to Shop 36.[11] (Appellant's exhibit 9, Board file tab 22). Although those results do show that appellant was loaned out much more than other employees, I do not find that significant in light of the foregoing evidence. I also note that, two of appellant's four loan-outs were voluntary, including the fourth -- which is the only one truly at issue in this case -- and that it was the longest one, and was generally proven to be beneficial.

Based on this evidence, I can lend no

credence to appellant's claim that either the specific loan-outs he was subjected to in 1988-90, or the practice of loan-outs generally, was the product of retaliation or was motivated by any intent to harm his career. More specifically, I find no evidence that retaliation for whistleblowing was in any way a contributing factor to his February 26, 1990, loan-out to Shop 06.

The nonselection

Appellant also failed to prove that retaliation for whistleblowing was a contributing factor in his 1990 nonselection for promotion to Machinist Foreman, WS-10, in Shop 31.[12] In addition to the preceding discussion, I rely on the following facts to support this conclusion.

Rom Barrington, the Mechanical Group Superintendent and the selecting official, described his standard procedure for promotions. When he has vacancies to be filled, he provided the shipyard's Industrial Relations Office (IRO) with information regarding the basic requirements of the position and IRO screened the applications to determine which applicants had the basic knowledge, skills, and abilities (KSA's) to perform in the position. Those individuals who survived this screening process were placed on a "best qualified" list of eligibles

from which selections were made. That procedure was followed for the promotion at issue in this case. (Agency tab 1B). Appellant was one of the 78 employees on the list.

Then, Mr. Barrington testified, he referred the list to one of his subordinates who was best able to "marry the characteristics of the individual with the nature of the vacancy," usually the Shop Superintendent where the vacancies existed and that individual acted as the recommending official. That was done in this case. Mr. Barrington referred the list to Tom Hamilton, the Superintendent of Shop 31. The recommending official either then recommended applicants on his own or, if necessary or appropriate, consulted with one or more of his general foremen. In this case, Hamilton conferred with GF II, Tom Davies.

These three -- Barrington, Hamilton, and Davies -- were the only individuals involved in the actual selection process. All three testified that appellant's name just never came up, either pro or con. Barrington did not know appellant at all. Hamilton and Davies knew of him vaguely as a skilled mechanic. None of the three had been the target of any of appellant's whistleblowing activities. There was no evidence that any of

the three, except Hamilton, even knew about appellant's activities until they were called to testify at the hearing. Mr. Hamilton testified that his predecessor had "waved appellant's letter to Captain Clark in front of him" in the course of explaining the variety and kinds of things he would have to deal with when he assumed his position in October 1989. Hamilton also was aware of appellant's letter to NAVSEA but "had never thought about it as whistleblowing" and didn't know if the IG was involved as a result.[13]

None of the three men discussed the selections with either Mr. Amdahl or Mr. Baker or with any other general foreman. Amdahl and Baker testified that they were not consulted regarding the selections, nor did they have any other input beyond the initial, unadorned recommendation that accompanied each applicant's application form. Both amdahl and Baker testified they recommended appellant, among many others, for promotion.

Appellant argued that, because "the members of the management team in Shop 31 function as a cohesive unit with meaningful interchange of information and with associated loyalties and commitments normally associated with a management team approach," his nonselection was tainted, and that Baker and Amdahl, as well as others with a motive to

retaliate, were the "functional selection officials." However, he presented no probative evidence to support this contention.

I find that none of the three managers shown to be involved in the selection process had knowledge of appellant's protected disclosures, with the exception of Mr. Hamilton, who had some vague, limited knowledge. None of the three was ever the target of any of the disclosures, nor did the disclosures create any motive for them to retaliate against appellant. *See McDaid*, 46 M.S.P.R. at 422-3. While the timing of the disclosures in relation to the nonselection could support an inference of retaliation, it does not in this case because of the other facts discussed above.

Appellant argued that the selection process violated the agency's merit promotion policy in various ways.[14] I found none of appellant's claims in this regard were well taken. For example, appellant noted that NAVSHIPYDPUGET INSTRUCTION 12335.1B, Chap. IX, §A, at p. 15, states that the "selecting official will be provided with all information presented by certified candidates which may include ... [the application form and various attachments thereto]. (Agency tab 4M). Barrington, Hamilton, and Davies testified they normally did not, and specifically did

not in this case, look at the applicants' application packages. They testified that the application packages were available to them if they needed to refer to them. Whether the foregoing provision of the instruction, read in conjunction with all the other components of the merit promotion policy, means that the selection team must obtain the applications and examine them, I need not decide. The issue in this case is not whether the agency rigorously followed its promotion policies, but whether retaliation for whistleblowing was a contributing factor in appellant's nonselection. There is just no evidence that deviations from the policy, if there were any, were motivated by retaliation against appellant.

Conclusion

A preponderance of the evidence does not establish that retaliation for whistleblowing was a contributing factor in either the 1990 loan-out to Shop 06 or to appellant's nonselection for Machinist Foreman. Therefore, appellant's request for corrective action must be denied.

DECISION

The agency's action is AFFIRMED.

John W. Tapp
Administrative Judge

NOTES

1. Pub. L. No. 101-12, 103 Stat. 16 (codified in scattered section of Title 5 of the United States Code).

2. The Act is only applicable to personnel actions initiated on or after its effective date, July 9, 1989. *See, e.g., McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 416, 419 (1990). Thus, evidence of alleged acts of retaliation occurring before July 9, 1989, was considered only for the purpose of allowing appellant to show a pattern of continuing retaliation which he alleged began in early 1988.

3. The Board's final regulations implementing the Act are found at 55 Fed. Reg. 28591, *et seq.* (July 12, 1990).

4. The normal practice was to first request volunteers and then make recommendations to meet the loan-out needs as to number or expertise. The General Foreman (GF) of the loaning entity would make the recommendations from the volunteers, and from non-volunteers if necessary or desirable, and the General Foreman II (GF II) would make the final decision. The GF II would routinely accept the GF's recommendations, however.

5. One other individual was given a temporary appointment for September and October 1990.

6. Appellant's attempt to appeal those actions to the Board prior to his exhaustion of remedies with the OSC was dismissed. *See Cook v. Department of the Navy*, MSPB Docket No. SE344390W0268, slip op. (Jul. 2, 1990). (Agency file tabs 4D and 4E).

7. In addition, Tom Hamilton, Superintendent of Shop 31, testified that working in Shop 06 would provide an "added dimension" to appellant's skills and have "a positive effect on his career."

8. It could be argued that, to the extent that the loan-outs are properly viewed as a single pattern of retaliatory action that was initiated before, and was pending on, the effective date of the WPA, the Board does not have jurisdiction over any of them. I choose not to analyze the issue in this manner, however.

9. To the contrary, appellant's letter apparently only objected to the disciplinary letters which resulted from the incident. There is no evidence that Mr. Amdahl was involved in this aspect of the affair. Mr. Kelly was the one who allegedly was required to apologize to appellant.

10. See *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (factors to be considered in determining credibility).

11. Appellant made an untimely discovery request for, *inter alia*, all loan-out records for all employees who had worked in Section 36 since October 1, 1986. Because the request was untimely, and because the agency objected on the additional ground that retrieval of these records would constitute an unreasonable burden, especially since it was so close to the hearing date, I ordered the agency to provide the records for only those employees who were presently assigned to Section 36. *See* Board file tabs 13 and 14, and statements on the record at the commencement of the hearing. Unfortunately, it does appear that this limitation resulted in a statistically invalid sample.

12. Nonselection for promotion is a "personnel practice." *See* 5 U.S.C. § 2302(a)(2)(A)(i) and 5 C.F.R. § 1209.4(a)(2).

13. In that regard, I note that the response of the NAVSEA IG to appellant, a letter dated December 15, 1989, essentially informed appellant that the issues he had raised were more appropriately addressed through the agency grievance system. (Agency tab 4F).

14. Regarding the agency's merit promotion policy, see agency tabs 4K through 4M, under Board file tab 7.

Pursuant to Rule 14.1(f)

Verbatim citations of U.S.C. and C.F.R. statues are presented.

5 CFR 1209.2 Jurisdiction

Subject to 5 U.S.C. 1214(a)(3), the Board has jurisdiction over appeals by an employee, former employee, or applicant for employment with respect to a personnel action taken, proposed, threatened, or not taken because of the individual's whistleblowing activities, as defined in 5 U.S.C. 2302(b)(8). Where it is alleged that a personnel action within the Board's jurisdiction was based on whistleblowing, the Board may also stay the personnel action.

5 CFR 1209.4 Application of 5 CFR Part 1201

Where appropriate and unless provided otherwise, the Board shall apply Subparts A,B,C,E,F, and G of 5 CFR Part 1201 to appeals and stay requests governed by this Part.

5 CFR 1209.5 Definitions.

(a)"Personnel action" means, as to individuals and agencies covered by 5 U.S.C. 2302:

(1)An appointment;

(2)A promotion;

(3)An adverse action under Chapter 75 of Title 5,United States Code or other disciplinary or corrective action;

(4)A detail, transfer, or reassignment;

(5)lA reinstsatement;

(6)A restoration;

(7)A reemployment;

(8)A performance evaluation under Chapter 43 of Title 5.United States Code;

(9)A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action;or

(10)Any other significant change in duties or responsibilities which is inconsistant with the employee's salary or grade level.

5 USC 7701. Appellate procedures

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only is the agency's decision--

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment--

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

5 CFR 1209.11 Burden and degree of proof.

(a) Subject to the provisions of paragraph (b) of this section, in any case involving alleged prohibitive personnel practices described in 5 U.S.C. 2302(b)(8). The Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment demonstrates that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action which was taken, not taken, or is to be taken against such employee, former employee, or applicant.

(b) Corrective action under paragraph (a) of this section may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken or not taken (as appropriate) the same personnel action in the absence of such disclosure.

5 CFR 1201.3 Appellate jurisdiction.

(a) Generally. The Board has jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation. These include appeals from the following actions:

(19) Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104).

(b) Appeals involving an allegation that the action was based on appellant's "whistleblowing." Appeals of actions appealable to the Board under any law, rule, or regulation, in which the appellant alleges that the action was taken because of the appellant's "whistleblowing" (a violation of the prohibited personnel practice described in 5 U.S.C. 2302(b)(8), are governed by part 1209 of this title. The provisions of subparts B,C,E,,F, and G of part 1201 apply to appeals and stay requests governed by part 1209 unless other specific provisions are made in that part.

5 CFR 1201.41 Judges.

Judges may exercise authority as provided in paragraphs (b) and (c) of this section on their own motion or on the motion of a party, as appropriate.

(b) **authority.** Judges will conduct fair and impartial hearings and will take all necessary action to avoid delay in all proceedings. They will have all powers necessary to that end unless those powers are otherwise limited by law. Judges powers include, but are not limited to, the authority:

(8)Rule on all motions, witness and exhibit lists, and proposed findings;

5 CFR 1201.56 Burden and degree of proof; affirmative defenses.

(b) Affirmative defenses of the appellant. Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (a) of this section, if the appellant:

(1)Shows harmful error in the application of the agency's procedures in arriving at it decision;

(2)Shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b);

(3)Shows that the decision was not in accordance with law.

5 CFR 1201.61 Exclusions of evidence and testimony.

Any evidence and testimony that is offered in the hearing and excluded by the judge will be described, and that description will be made a part of the record.

5 CFR 1201.63 Stipulations

The parties may stipulate to any matter of fact. The stipulation will satisfy a party's burden of proving the fact alleged.

5 CFR 1201.115 Contents of petition for review.

(c) The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that:
(1)New and material evidence is available that, despite due diligence, was not available when the record closed; or
(2)The decision of the judge is based on an erroneous interpretation of statute or regulation.